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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 569

GENERAL FOODS CORPORATION, HUNT FOODS, INC. and MORTON SALT COMPANY,

Petitioners,

vs.

STATE WHOLESALE GROCERS, et al.

Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Respondents (hereinafter sometimes referred to as "Plaintiffs") respectfully submit the following in opposition to the Defendant Suppliers' Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on July 25, 1958 as amended on September 17, 1958.

QUESTIONS PRESENTED.

Questions 1 and 4 as stated by Petitioners are not issues before this Court. The issue of burden of proof alleged in question 1 is non-existent, the Court of Appeals having found, and the Stipulations and evidence support the finding, that all the necessary elements of a violation of Section 2(d) were proved. Further, the only burden of proof imposed upon the defendants by the Court of Appeals was that of proving availability of proportional equal payments to any plaintiff. Even, therefore, if the issue of burden of proof were not moot, the question should properly read:

> 1. "Is the proportional availability of payments an affirmative defense under Section 2(d) of the Robinson-Patman Act as to which the burden of proof rests upon the defendant or is proof of the absence thereof a part of the plaintiffs' *prima facie* case?"

Question 4 inquiring as to whether in order to be a customer of a supplier "competing in the distribution of such products" under §2(d), a retailer must handle the specific product of the supplier at the time of promotion thereof by the supplier, is similarly moot inasmuch as the Record establishes that each plaintiff retailer met this required specificity.

Question 2 is but a partial statement of the "service or facility" issue under §2(d), omitting essential facts proved herein as found by the Court of Appeals. We submit that, pursuant to that Court's finding, the proper statement thereof is:

> 2. "Is a supplier's payment for a leading national magazine published by a wholly owned subsidiary of a customer and sold only in that favored customer's retail stores, payment for a service or facility within the meaning of §2(d) where the food products advertised therein are exclusively products sold in that

customer's stores and where the magazine was created for and serves as a promotional device of that customer, is an effective means of cost free advertising of that customer's stores in general in all types of internal and external media, creates good will enabling those stores to attract new customers and keep old ones, and exists solely for competitive benefit to that customer's retail stores?"

Question 3 relating to who is a "customer" under §2(d) similarly omits essential, proved facts and findings and should read:

3. "Is a retailer a 'customer' of a supplier within the meaning of §2(d) if the retailer purchases a supplier's products from a jobber or wholesaler, but where a direct relationship exists between the supplier and that retailer, such as direct visitation of the retailer by the supplier, direct solicitation and writing up of orders then given to the wholesaler by the supplier and the furnishing by the supplier directly to the retailer of diverse personnel and materials to aid in selling the supplier's products?"

STATEMENT OF THE CASE.

Respondents respectfully submit that certain essential facts were omitted from Petitioners' statement of the case. These are as follows:

The annual costs of producing the magazine, *Woman's Day,* is approximately 9 million dollars per year. Of that total cost approximately 7 million dollars annually is paid to Woman's Day, Inc., a wholly owned subsidiary of A & P, by the Defendant suppliers and other suppliers of products sold by the said A & P. The annual payments of the food suppliers to Woman's Day, Inc. represent for the years pertinent hereto approximately 8% to 10% of the net profits of A & P (before taxes) in all of its operations. This added revenue to A & P was thereby available

(after reduced by taxes) to A & P for competitive purposes. The magazine, *Woman's Day,* sells approximately 42 million copies per year in the stores of A & P only. At all times it contained on its cover the legend "The A & P Magazine" and was without exception expressly held out and advertised to the public as the A & P magazine, available only at A & P stores. It was created by A & P as a promotional device for A & P to create customer good will and to increase or maintain store traffic. It promoted A & P and A & P stores without cost to A & P in all types of internal and external media, including other magazines, newspapers, radio and television. All of the food products advertised therein were exclusively products sold in A & P stores. *Woman's Day* is an effective media for the advertising of A & P stores in general, it creates good will among the customers of A & P and it attracts new customers for A & P and keeps their old ones. It exists exclusively for the competitive benefit of A & P's retail stores. All of the foregoing is without cost to A & P and in fact the magazine, *Woman's Day,* produced a profit to A & P and is a source of revenue to A & P. *Woman's Day* is the only national magazine published by a wholly owned subsidiary of, and distributed exclusively though the retail stores of, a single retail food organization.

The Defendant suppliers used *Woman's Day* for the purpose of increasing the sales of the products of the Defendant suppliers to A & P customers in A & P stores.

ANSWER TO PETITIONERS' REASONS FOR GRANTING THE WRIT.

I.

THE RULE OF LAW LAID DOWN BY THE COURT BELOW REGARDING THE PROCEDURAL ISSUE OF BURDEN OF PROOF WAS DICTUM AND NOT IN CONFLICT WITH THE DECISION OF ANY OTHER COURT OR OF THE FEDERAL TRADE COMMISSION.

Contrary to Petitioners contention drawn from the removal from context of isolated portions of the Court's Opinion, the 7th Circuit Court of Appeals did not excuse Plaintiffs from establishing a *prima facie* case, did not shift that burden of proof to the Defendants and did not upset the procedural law applicable to every Section 2(d) and 2(e) Robinson-Patman Act case. Consideration of the entire Opinion makes inescapable the conclusion that only after the Plaintiffs have established a *prima facie* case by proving that each was a customer of the Defendant suppliers competing with A & P and that each did not receive payments proportionally equal to the suppliers' payments to A & P, does the burden fall upon the Defendants to show that such payments were nevertheless made proportionally available to Plaintiffs, the only statutory justification for non-payment under §2(d). This Petitioners themselves acknowledge. (Pet. 17). The imposition upon Defendants of this limited burden of proving proportional availability is consistent with all the decisions. Actually the entire reference to burden of proof in the instant case was but dictum; the Court, as will be specifically shown, having found that each Plaintiff was a customer of each Defendant supplier and it having been stipulated not only that each Plaintiff retailer was a competitor of A & P but

neither received nor had had made available to him payments proportional to the suppliers' payments to A & P. Petitioners in their Petition for Rehearing acknowledged that the burden of proof issue had actually been stipulated out of this case. (Pet. for Reh. of Def. Suppliers, p. 12).

The imposition of the burden of proof upon a supplier to prove proportional availability after a competing customer has established a *prima facie* case of non-payment is completely consistent with the decisions referred to by Plaintiffs. In *Atalanta Trading Corp.* v. *Federal Trade Commission*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958) (2d Cir.), 1958 C.C.H. Trade Cases, Par. 69,099, the Court's objection to the Commission's finding that a *prima facie* case had been established was that Plaintiff had not proved that the non-favored customer was a competing customer. By clear implication, had such showing been made as was done in the instant case, the liability of the supplier would have been established unless the supplier was able to prove proportional availability notwithstanding its failure to actually make proportional payments. The Court in *Simplicity Pattern Co., Inc.* v. *Federal Trade Commission*, 258 F. 2d 673 (Adv. Sheet No. 3, Oct. 27, 1958) (D.C. Cir.), 1958 C.C.H. Trade Cases, Par. 69,047, clearly acknowledged defendant's burden of proving statutory justification for the absence of proportionally equal treatment.

The correctness of imposing upon a Defendant the burden of proving proportional availability is clear. The violation here involved is one of Section 2(d) of the Robinson-Patman Act. A 2(d) violation is a *per se* violation where failure to make proportionally equal payments to competing customers can be justified only by proof that such payments were nevertheless made available to competing customers. If this were not the burden of the Defendant, the Plaintiff in a Section 2(d) case would have the entire bur-

den of proof thereunder, including negating the only affirmative defense available to a Defendant under that Section, namely, proportional availability.

It is apparent, therefore, that Petitioners in order to rationalize a basis for urging a writ of certiorari upon which basis they could and did place their primary reliance, unwarrantedly concluded that the Court of Appeals imposed a broad, extensive burden of proof upon Defendants affecting all 2(d) and 2(e) Robinson-Patman Act cases. They but created a strawman to destroy. The fact is that not only did the Court of Appeals impose upon Defendants only the burden of proving the affirmative defense of proportional availability but, in fact, the entire issue of burden of proof had been stipulated out of the instant case. The decision of the Court of Appeals was correct and consistent —rather than in conflict—with the prevailing opinions of other circuit courts.

II.

THE "SERVICE OR FACILITY" ISSUE.

Contrary to Petitioners contention, the Court of Appeals made no generalizations with reference to the "service or facility" issue applicable to and affecting all 2 (d) and 2(e) Robinson-Patman Act cases. Rather, the findings of that Court were based upon the specific evidence introduced in this case and applicable only thereto. Further, the Opinion of the Court was neither inconsistent nor self-contradictory. The inconsistency of which Petitioners complain resulted solely from their attempt to inject into the Opinion the same artificial analysis of fact and law twice urged by them before the Court of Appeals and twice repudiated.

Petitioners argue that the Court having found that Supplier payments to *Woman's Day, Inc.* for advertising space therein did not constitute a *furnishing* of the maga-

zine, *Woman's Day*, within the meaning of Section 2(e) and inasmuch as *Woman's Day* was found to be the service or facility furnished by or through A & P, it must follow that such payments cannot constitute violations of 2(d). The Court of Appeals on the other hand concluded that although such payments by suppliers, making up 7 million dollars of *Woman's Day's* 9 million dollar annual cost, did not constitute a physical *furnishing* of *Woman's Day* under Section 2(e), such payments did constitute *payments* for *Woman's Day* under Section 2(d) inasmuch as it is "the *fact* of paying or contracting for the services or facilities referred to (which) is proscribed by that section . . ." (Emphasis the Court's). (App. 31)* This conclusion is consistent with both the facts and the law.

The Court of Appeals construed Section 2(e) as requiring a physical furnishing of a service or facility, concluding that the payments for *Woman's Day* did not constitute such a furnishing because the suppliers:

> "In no way dictated the editorial or other policies of *Woman's Day*. They did not manage or control the operation thereof. They did not have anything to do with the printing of the magazine or the furnishing of any paper or materials used in the magazine's publication . . . They were not furnishing . . . any part of the production of the magazine. That production was exclusively a function of Woman's Day, Inc."

However, that Court did find that the payments to the magazine for advertising space therein constituted payments for that service or facility, *Woman's Day*, under § 2(d), a fact well supported by the evidence.

Petitioners, as they did unsuccessfully before the Court of Appeals, seek to isolate the payment for advertising space in *Woman's Day* from *Woman's Day* itself. The

* The Appendix made a part of the Petition for Rehearing will be referred to herein as "App. ....." The Appendix filed in the Court of Appeals and entitled "Appendix to Appellants' Brief" will be referred to herein as "App. to Appellants' Brief —".

Court, however, found as a matter of fact that such payments constituted payments for the magazine. If each supplier had made payments to *Woman's Day, Inc.* without receiving advertising space therein it would be undenied that they would be paying for *Woman's Day* in clear violation of Section 2(d). Petitioners do not deny the correctness of the Court of Appeals conclusion that neither motive, intent nor the receipt of value by a supplier for a discriminatory payment affects the violative nature of that payment under Section 2(d). The advertising space in *Woman's Day* received by suppliers is nothing but value received for such payment; the effect of the payment is the same. Yet the Defendant suppliers continue to urge the *non-sequitur* that their payments to *Woman's Day* were not payments for *Woman's Day.*

The distinction between Sections 2(d) and 2(e) found by the Court of Appeals is as simple as this: § 2(e) restricts the physical *furnishing* of a service or facility by a supplier to a favored customer whereas § 2(d) restricts the *payment* therefor by the supplier. Although these two sections in some respects have been similarly construed, at no time have the Courts found them to be synonymous. Had Congress intended that result there would have been but one section. That payment to *Woman's Day* for advertising space therein may not constitute a *furnishing* of a facility under Section 2(e), therefore, does not preclude such payments from constituting *payments* for that facility under Section 2(d), the natural result thereof as found by the Court of Appeals.

The factual conclusion of the Court of Appeals that the payments of the Defendant suppliers were in fact payments for the magazine *Woman's Day* is not made inconsistent by Petitioners strained and artificial construction of the facts. *Woman's Day*, the facility found to be paid for by the suppliers was of immeasurable cost free benefit to A & P. The stipulations and the evidence established

that it is the *only* magazine published by and distributed exclusively through the retail stores of a single chain organization, being always identified on the cover and to the public as the magazine of that single chain, containing advertisements only of the food products sold in that chain's stores, used as a means of specifically advertising that single chain without cost to it in all types of internal and external media and being otherwise of immeasurable cost free benefit to A & P. The Court of Appeals found, and the evidence adequately supports such finding, that:

> "*Woman's Day* is an effective medium for the advertisement of the A & P stores in general. It creates good will among the customers of A & P. It attracts new customers for A & P and keeps its old ones. It sells approximately 42 million copies a year (In A & P stores only). It is a promotional operation of A & P. It exists solely for competitive benefit to A & P's retail stores". (Parenthetical expression ours); (App. 25)

It is apparent that the Court of Appeals was not inconsistent and made no sweeping findings with reference to the nature of a service or facility applicable to all Robinson-Patman Act cases, as petitioners allege to justify their request for certiorari. Rather, the Court made specific findings from the specific evidence herein introduced, applicable only to what it found from such evidence to be the service or facility here involved. The facts of this case with reference to the service or facility, *Woman's Day*, and the payment therefor have meaning only in the factual setting found by the Court and no effort by petitioners can give to these specific facts a general application. This is of even greater significance inasmuch as A & P, subsequent to the decision, sold its entire interest in *Woman's Day* (A. & P. Motion Amicus Curiae, p. 3) and therefore, that which was found to be the service or facility in this case cannot be the source of subsequent violations of §2(d).

III.

THE "CUSTOMER" ISSUE.

Petitioners then contend that if the Court of Appeals concluded that each Plaintiff was a *customer* of each supplier within the meaning of Section 2(d), then such conclusion is in conflict with the decision of the Third Circuit Court of Appeals in *Klein* v. *Lionel Corp.*, 237 F. 2d 13 (1956) because plaintiffs purchased defendants' products from wholesalers and not directly from the defendant suppliers.* The Court of Appeals in the instant case did find each Plaintiff to be a customer of each Defendant supplier within the meaning of Section 2(d), inasmuch as it found that that section required proportionally equal payments to be made to all competing customers of the suppliers and further found that the Defendant suppliers had violated that section by neither giving nor making available to the Plaintiffs such proportional payments. That conclusion is consistent with all of the decided cases including the *Klein* case.

The Trial Court in the instant case specifically found that "each of the defendant suppliers maintained a direct relationship with each of the Plaintiff retailers and other retailers similarly situated". (App. to Appellant's Br. 223) This finding sustained by the Court of Appeals was overwhelmingly supported by the evidence. It was stipulated as follows: 44 promotional men of General Foods each made 8 or 10 calls daily upon all Chicago retailers, directly soliciting sales and writing out orders, which were delivered either by that representative or by the retailer to the wholesaler or cooperative. In addition the company furnished to such retailers display and merchandising assistance and personnel such as demonstrators, sign painters, window trimmers, artists, food display and layout

* It was, however, stipulated that all but 8 plaintiffs bought Maxwell House Coffee directly from the defendant, General Foods Corporation (App. to Appellants' Br. 144).

personnel and the like. Representatives of Morton Salt promoted sales by directly soliciting orders from all Chicago retailers which they wrote out for the retailer, in addition to furnishing personnel to prepare food counters and window and shelf displays and gave other direct assistance and material. The Defendant Hunts similarly made directly available to all purchasers of the company's products, sales and promotional materials. (App. to Appellants' Br. 96, 100, 117, 141, 144-5)

Where such direct relationship between supplier and retailer exists short of actual sale, the Courts and Commission have consistently held the retailer to be a customer of the supplier. *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (2d Cir., 1946), Cert. den. 331 U.S. 806 (1946); *Kraft-Phenix Corp.*, 25 F.T.C., 537 (1937); *In re Luxor*, 31 F.T.C. 658 (1940). See also *F.T.C.* v. *Morton Salt*, 334 U.S. 37 (1948). The Trial Court in *Klein* v. *Lionel*, 138 F. Supp. 560 (D.C. Del., 1956) expressly recognized these prior decisions, acknowledged their validity and distinguished them from the *Klein* case on the facts because in the *Klein* case no relationship whatsoever between supplier and retailer was alleged, the Court saying (p. 564):

> "In the cited cases where the manufacturer dealt with a jobber, and a retailer from such jobber was held to have had some relationship to the manufacturer, it appeared that the manufacturer had either a direct relationship with the retailer *or* that it exercised a control over the relationship between the jobber and retailer. No such relationship exists here. No direct dealings have been alleged or shown between Lionel and the Plaintiff *nor* any measure of control by Lionel over the dealings of any jobber." (Emphasis ours).

The Court of Appeals for the Third Circuit in affirming the decision of the lower Court in the *Klein* case, 237 F. 2d 13 (3rd Cir., 1956) specifically noted the absence of any direct relationship between retailer and supplier, except for an alleged fair trade contract not with the Plaintiff specifically but covering that level of distribution. The

Court said (p. 16) "we, therefore, hold that a retailer who buys from a jobber does not become a purchaser under Section 2(a) of the Clayton Act *merely because* the products he deals in are fair traded" (Emphasis ours). Neither the Trial Court nor the Court of Appeals in the *Klein* case precluded the indirect purchaser from being a customer of the supplier where a direct relationship between the two, short of actual sale, existed. Rather, application of the rule there stated was limited to a fact situation where no direct relationship was alleged as between the supplier and customer.

That the rule of the *Klein* case is so limited is clear from *Skinner* v. *U. S. Steel Corp.*, 233 F. 2d 762 (5th Cir. 1956). That Court not only re-affirmed the decisions holding an indirect purchaser to be a customer within the meaning of that section but more significantly found such decisions to be completely consistent and compatible with the lower court *Klein* case. The express reason given by the Court for finding such compatibility was that the prior cases involved a direct relationship between supplier and indirect purchaser which was completely absent from the *Klein* case. The direct relationship between the Plaintiffs and the Defendant suppliers in the instant case as heretofore set out is substantially more than found in *Elizabeth Arden, Inc.* v. *F.T.C.*, 156 F. 2d 132 (2nd Cir. 1946), Cert. den. 331 U.S. 806 (1946) whose conclusion that the indirect purchaser was a "customer" was specifically reaffirmed in the *Skinner* case and held to be compatible with the *Klein* case. See also Kelley, *N. Y. State Bar Ass'n Symposium Anti-Trust Laws* (C.C.H., 1948) 114, 130; Keeton, Dean Texas Law School, 1950 *Institute on Anti-Trust Laws* (Southwestern Legal Foundation, 1950) 117, 130. Assuming arguendo the validity of the *Klein* case when applied to its limited facts, it is not inconsistent with the instant case.

There is further distinction between the facts of the *Klein* case and the instant case. The *Klein* case involved an alleged violation of Section 2(a) whereas the instant case involves a violation of Section 2(d). The latter section and section 2(e) were enacted to preclude suppliers, particularly in the food industry, from discriminating in favor of the chain store—the direct buyer—as opposed to the independent retailer—the indirect buyer—in a manner not encompassed by Section 2(a). Excluding the indirect buyer from the protection of Section 2(d) is to sanction the very discriminatory practice that section was enacted to preclude.

Petitioners' suggestion that the conclusion of the 7th Circuit Court of Appeals is contrary to certain Congressional citations included by petitioners (Pet. 16-17) is completely without merit. These citations do not answer but merely state the basic question: Who is a "Customer" under the Act? The conclusion of the Court of Appeals that the plaintiffs are "customers" of each defendant supplier within the meaning of § 2(d) is correct and consistent with the decisions.

IV.

THE "COMPETING IN THE DISTRIBUTION OF SUCH PRODUCTS" ISSUE.

Petitioners contend that the Trial Court improperly concluded that the Plaintiff retailers were customers of the Defendant suppliers in competition with A & P even though each Plaintiff retailer did not handle the specific products of the supplier at the time of their advertisement, which Petitioners erroneously assume to be the facts in the instant case. They contend further that this conclusion of the Court of Appeals is contrary to the ruling in *Atalanta Trading Corp.* v. *F.T.C.*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 C.C.H. Trade Cases, 69,099 (2d Cir.). Petitioners create this issue of specificity in the in-

stant case when it does not actually exist and petitioner, Morton Salt, has in substance so acknowledged. (Pet. for Reh. p. 15). Petitioners contend that it was stipulated that Plaintiff stores are in competition with an A & P store only in the sense that both stores are seeking to gain the trade of at least one customer. By ignoring the balance of the stipulation (App. to Appellants' Br. 58) they create the ficticious issue of specificity by concluding that there was, therefore, no evidence from which the Court of Appeals could conclude that each Plaintiff retailer carried the products of the Defendant suppliers at the time of the advertisement thereof and that the conclusion of the Court that each Plaintiff retailer was "competing in the distribution of such products" was in error. The fact is that the above stipulation executed by each supplier further expressly provided: "such fact is sufficient to establish that each retail plaintiff is a competitive seller of A & P store solely for purposes of Sections 2(d) and (e) of the Robinson-Patman Act". This portion of the stipulation petitioners do not quote. Each Defendant supplier by executing and adopting this stipulation stipulated that each retailer was as to each Defendant supplier and its products, a competitor of A & P within the provisions of Section 2(d). The only language of Section 2(d) defining competition is found in the words "competing in the distribution of such products or commodities".

If, therefore, as petitioners contend, a customer must handle the specific products of the specific supplier to be a customer "competing in the distribution of such products or commodities" within the meaning of Section 2(d), then each defendant supplier stipulated, and the Court so found, that each plaintiff retailer meets that requirement. The defendants cannot stipulate that as to each of them plaintiffs are competitors of A & P within the meaning of Section 2(d) and then, as an afterthought, subsequently contend that plaintiffs, having failed to introduce specific

proof in connection therewith in reliance upon the stipulation, have failed to prove that they are competitors under Section 2(d) within Petitioners' construction thereof.

Further, it was also stipulated (App. to Appellants' Br. 54), and the Court of Appeals specifically found (App. 23) that each plaintiff retailer at all times pertinent hereto sold one or more of the products of each of the defendant suppliers. A similar stipulation was entered into with reference to the plaintiff wholesalers (App. to Appellants' Br. 54), concerning which the Defendant, General Foods Corporation, originally stated that, "while the particular products are not identified, it is fairly inferable from the evidence that A & P purchased the same products from General Foods". (General Foods Trial Br. 55) Why was this similar conclusion not equally inferable from the very same stipulation with reference to the retailers, particularly since it was further stipulated as to the retailers that they were competitors of A & P for all purposes under Section 2(d). The only difference, between the wholesalers and retailers in the agreed facts is that the former acquired their products directly from the suppliers and the latter from wholesalers. What petitioners are really arguing, therefore, is not that these specific products were not being handled by the Plaintiff retailers, the stipulations establishing the contrary, but rather that they were not bought directly from them. It having been established that the indirect purchaser argument has no applicability in this case, this contention of these petitioners must necessarily fall. Therefore, even if petitioners are correct in contending that each Plaintiff retailer must handle the specific products at the specific time in order to qualify as a customer under Sec. 2(d), each plaintiff retailer so qualifies. The requirement of *Atalanta Trading Corp.* v. *F.T.C.*, 258 F. 2d 365 (Adv. Sheet No. 2, Oct. 20, 1958), 1958 CCH Trade Cases Sec. 69,099 (2d Cir., 1958), relied upon by the petitioners, has here been met and there is no conflict as to substantive law between the Circuits.

Actually, there is a substantial difference between the facts in the *Atalanta* case and the instant case, which makes the requirement of specificity urged by the petitioners inapplicable here even though actually met. In the *Atalanta* case the supplier was granting allowances to a favored customer to advertise a specific product only. The service or facility there involved was not an exclusive store publication or similar general facility which in itself constituted a beneficial promotional and advertising device for the favored customer's business generally, which the Court of Appeals found as a fact to be true of *Woman's Day*. The Court of Appeals found that each supplier made payments for *Woman's Day* which magazine "is an effective medium for the advertisement of the A & P Stores in general"; "creates good will among the customers of A & P", "attracts new customers for A & P and keeps its old ones" and "exists solely for competitive benefit to A & P's retail stores" (App. 25). Each Defendant supplier in making payments to *Woman's Day* was, therefore, paying for a service or facility which, as established by the evidence, promoted A & P's general business and traffic in innumerable ways, thus enhancing the sale of all products that the Defendant suppliers sold in A & P stores.

Where a supplier pays for a service or facility which promotes the business of the favored customer generally, that payment is in connection with the resale of all of the products of that supplier being sold by that customer. So long as any product of that supplier is then being handled by other retailers, and it was expressly stipulated that this was the fact in the instant case, those retailers are competitors of the favored customer as to that supplier's products generally.

CONCLUSION.

For all of the foregoing reasons, we earnestly urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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